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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 80 MISC.

JAMES N. LEWIS,

Appellant,

v

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS APPEAL

RICHARD W. ERVIN
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Appellee moves the Court to dismiss or affirm the appeal herein on the following grounds:

(1) Title 28, U.S.C.A., Section 1257, permits review by appeal, where there is drawn in question the validity of a treaty or statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. No such question appears in the case at bar, thereby depriving the

Court of proper appellate jurisdiction. Appellant is apparently utilizing an appeal as his mode of review which is revealed by his styling of the cause and the attempts thus far to comply with Part IV of the Supreme Court Rules applicable to appeals.

(2) Appellee is cognizant of Title 28, U.S.C.A., Section 2103, which provides that where an appeal is improvidently taken from the decision of the highest court of a state in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

(3) Despite the fact that the present appeal may be deemed and treated as a petition for writ of certiorari, nevertheless a review of this matter in any form is defective for the following reasons:

(a) The record discloses that the constitutional question now relied upon in this Court, despite adequate opportunity in the Court below, had never been raised at any stage in the proceedings. Contrary to the Appellant's Jurisdictional Statement implying such allegation of unconstitutional procedure, the record is barren of any raising of such issue. Thus, under long-recognized rules of law, the issue cannot be properly presented at this late date. No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as

well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. In fact, this Court, in *Yakus v. United States (1944), 64 S. Ct. 660, 321 U.S. 414, 88 L. Ed. 834,* stated that the rule is invariably adhered to in cases from state courts. See also *Michel v. Louisiana (1955), 76 S. Ct. 158, 350 U.S. 91, 100 L. Ed. 83,* wherein this Court concluded that it would not consider a constitutional question that was not raised below.

(b) The decision of the Supreme Court of Florida in 93 So. 2d 46, now on appeal, reveals that the points raised to that body were in fact solely state issues, namely, that the petition for writ of error coram nobis was filed much too late and, moreover, that the issues raised were clearly res judicata, because there had been a previous petition on January 19, 1955, for habeas corpus, alleging the same grounds and relying on the same matters and points of law, which had been denied. Thus, it must follow, under this Court's consistently adhered-to ruling as succinctly expressed in *Williams v. Kaiser, 65 S. Ct. 363, 323 U.S. 471, 477, 89 L. Ed. 398,* that where the decision of the state court *might* have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it.

(c) The issue asserted by the appellant as to the ninety-day limitation within which to file proceedings in the nature of coram nobis, as being unconstitutional is completely without merit. Under a long array of precedent,

as precisely expressed in the relatively recent decision of *Carter v. Illinois, 67 S. Ct. 216, 329 U.S. 173, 91 L. Ed. 172,* this Court is committed to the proposition that each state has the right to establish its own rules of criminal procedure, provided they do not deny fundamental guarantees of due process. In the present cause, the appellant does not complain that he had no opportunity to present the issue, but rather that the prescribed ninety-day period was insufficient and deprived him of due process. In the instant case, the point relied upon by appellant truly pertains to the procedural limitation of ninety days within which to file his petition, and such contention is clearly untenable.

WHEREFORE, appellee respectfully submits that the mode of review by appeal improvidently adopted by the appellant must be deemed and treated as certiorari; and, moreover, that a review by any mode must be dismissed or judgment below affirmed for the reasons and grounds hereinabove set forth.

Respectfully submitted,

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